Court of Appeals, State of Michigan

ORDER

Citizens Protecting Michigan's Constitution v Secretary of State

Docket No. 286734

Bill Schuette
Presiding Judge

William C. Whitbeck

Patrick M. Meter
Judges

Intervening defendant Reform Michigan Government Now! ("RMGN") has moved for recusal of Court of Appeals Judges Pat M. Donofrio, Joel P. Hoekstra, Donald S. Owens, David H. Sawyer, William C. Whitbeck, Helene N. White, and Kurtis T. Wilder. We deny the motion.

I. Background

In the underlying original action for a writ of mandamus, plaintiffs seek an order directing the Michigan Secretary of State and the Michigan Board of Canvassers to reject an initiative petition, which would alter the Michigan Constitution. The initiative petition was filed by RMGN and would, among other things, eliminate the judgeships of the seven judges named in RMGN's motion for recusal, and subject the remaining judges of this Court to a 15 percent cut in salary.

Plaintiffs' complaint was filed on July 24, 2008. RMGN's motion for recusal was filed on August 1, 2008. On August 4, 2008, this Court issued a scheduling order. That order is significant for two reasons. First, the order directed that any further motions must be filed before August 6, 2008 at 4:00 p.m. Second, the order disclosed which judges of this Court were to hear this case. Therefore, RMGN had the opportunity to amend its motion, or to file new motions, in light of the composition of the panel, but failed to do so. Judge Whitbeck writes a concurrence to this order, concerning RMGN's motion for disqualification as to him personally. However, as a panel, we do not consider the motion currently before us as a motion to recuse only Judge Whitbeck, the sole member of this panel named in RMGN's motion, but a motion to recuse all seven judges named in RMGN's motion.

II. RMGN's Bases for Disqualification

RMGN moves for disqualification under MCR 2.003(B)(5), and the Due Process Clauses of the United States and Michigan Constitutions, US Const, Am XIV, and Const 1963, art 1 § 17. RMGN alleges that because the seven named judges would lose their judgeships if the initiative petition were approved, those seven judges cannot impartially hear this case.

A. Court Rules

MCR 2.003(B) provides, in part, that a "judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:"

> (5) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in

a party to the proceedings or has any other more than de minimis interest that could be substantially affected by the proceedings.

B. Due Process

Although most matters relating to judicial disqualification do not rise to a constitutional level, due process does require an unbiased and impartial decisionmaker. *Cain v Dep't of Corrections*, 451 Mich 470, 497, 498 n 33; 548 NW2d 210 (1996). Disqualification is warranted under the Due Process Clause in situations where "'experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Id.* at 499, quoting *Withrow v Larkin*, 421 US 35, 46-47; 95 S Ct 1456; 43 L Ed 2d 712 (1975) (emphasis omitted); see also *Meagher v Wayne State Univ*, 222 Mich App 700, 725-726; 565 NW2d 401 (1997). One such situation that is relevant to the instant discussion is where the judge or decisionmaker "has a pecuniary interest in the outcome." *Crampton v Department of State*, 395 Mich 347, 351; 235 NW2d 352 (1975). *Crampton* offered the following examples of constitutionally intolerable pecuniary interests:

> In *Tumey v Ohio*, 273 US 510; 47 S Ct 437; 71 L Ed 749; 50 ALR 1243 (1927), the Court held that the village mayor could not sit as judge on "the liquor court" where he was directly compensated out of fines collected for violation of the state prohibition act.
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> Even though the Mayor in *Ward v Monroeville*, 409 US 57, 60; 93 S Ct 80; 34 L Ed 2d 267 (1972), was not personally compensated out of traffic fines, the Court held that because he was responsible for village finances he could not fairly adjudicate and impose fines for traffic offenses. Such responsibility might "make him partisan to maintain the high level of contribution from the mayor's court."
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> In *Gibson v Berryhill*, 411 US 564; 93 S Ct 1689; 36 L Ed 2d 488 (1973), the Court concluded that a board of optometry, composed of members of an optometric association which excluded from membership salaried optometrists employed by other persons or entities, had a pecuniary interest in the outcome of proceedings brought against optometrists for unethical conduct in practicing as employees of a business organization. Nearly half of the optometrists practicing in the state were salaried employees of business corporations. If the effort to revoke the licenses of salaried optometrists succeeded, the optometrists engaged in private practice would realize an increase in business. [*Crampton*, *supra* at 351-352.]

In addition, our Supreme Court has acknowledged that "there may be situations in which the appearance of impropriety on the part of a judge or decisionmaker is so strong as to rise to the level of a due process violation." *Cain*, *supra* at 512 n 48.

However, the Due Process Clause "demarks only the outer boundaries of judicial disqualifications[,]" *Aetna Life Ins Co v Lavoie*, 475 US 813, 828; 106 S Ct 1580; 89 L Ed 2d 823 (1986), and disqualification under the Due Process Clause is "only constitutionally required in the most extreme cases." *Cain*, *supra* at 498. Therefore, generally, where a state has adopted its own standards for judicial disqualification, those standards will control, as any violation of the Due Process Clause would also be likely to amount to a violation of the state standards. See Flamm, Judicial Disqualification (2d ed), § 2.5.2, pp 34-35. Consequently, although due process is always a consideration, in light of the fact that MCR 2.003(B) specifically deals with a judge's "economic

interest," as well as a litany of situations where there may be an appearance of bias or partiality, the primary authority for determining whether disqualification is warranted is the court rules.

III. Analysis

A. Economic and Pecuniary Interest at Issue

RMGN moves for disqualification of the seven named judges on the ground that they have a more than de minimis economic interest and a substantial pecuniary interest in the outcome of this case as they stand to lose their judgeships. However, in our opinion, RMGN has failed to effectively distinguish the economic and pecuniary interests of the seven challenged judges from the economic and pecuniary interests of the other judges of this Court. As mentioned, if the initiative petition is approved, all judges of the Court of Appeals[1] will be subjected to a 15 percent reduction in salary. Clearly, a potential salary reduction creates an economic and pecuniary interest on the part of all Court of Appeals judges. By challenging only the judges who will lose their judgeships, RMGN has apparently conceded that a potential 15 percent reduction in salary is not a disqualifying interest, and also presumed that, if the initiative petition is approved, the economic and pecuniary impact on the seven named judges will be significantly greater than the economic and pecuniary impact on the other judges of this Court.

As Judge Whitbeck outlines in more detail in his concurrence, an equally persuasive argument may be made that a judge who loses his or her judgeship should this initiative receive voter approval could very well earn a salary equal to, or in excess of, his or her judicial salary. Therefore, the loss of a judgeship may not necessarily result in a substantial economic and pecuniary loss to the seven named judges or to any other member of this Court. Also, as mentioned by plaintiffs, a 15 percent cut in salary, which may have an adverse consequence on future pension benefits of a judge, may prompt a member of this Court to resign before the effective date of any provision of this proposal. Therefore, there may be other members of the Michigan Court of Appeals, not named in RMGN's motion, similarly situated to the seven named judges.

At oral argument, RMGN failed to provide an adequate explanation differentiating between and among the economic and pecuniary interests of the seven judges named in the motion, and the economic and pecuniary interests of the other judges of this Court. Therefore, we are not convinced that RMGN has offered anything other than a distinction without a legal difference. In other words, RMGN has failed to establish the line between the apparently non-disqualifying economic and pecuniary interests of the judges that face a potential salary reduction, and the allegedly disqualifying economic and pecuniary interests of the judges that face the loss of a judgeship. Consequently, in our opinion, in regard to economic and pecuniary interest in the outcome of this case, the judges of this Court stand as a whole.

B. Rule of Necessity

The presence of a common economic and pecuniary interest held by all of the judges of this Court implicates the "rule of necessity." The rule is a "well-settled principle" of common law that:

> "although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot

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[1] Judge Schuette, who is leaving the bench on December 31, 2008, may be the one judge of this Court who may not be affected by the petition.

be heard otherwise." [*United States v Will*, 449 US 200, 213; 101 S Ct 471; 66 L Ed 2d 392 (1980), quoting F. Pollack, A First Book of Jurisprudence 270 (6th ed. 1929).]

The rule of necessity "operates on the principle that where disqualification would result in an absence of judicial machinery capable of dealing with a matter, and thereby negate the only tribunal with power to act in the premises, disqualification must yield to necessity." Flamm, § 20.2, pp 576-577.

The rule has consistently been applied in both federal and state courts. *Will*, *supra* at 214. It is most commonly applied where all judges of a court are subject to the same disqualifying circumstance, such as, as in the instant case, where the resolution of the matter will directly affect the pecuniary interests of judges as a whole. See generally, Flamm, § 20.2, p 576-581. For example, in *Will*, *supra,* the United States Supreme Court applied the rule in a case raising a challenge to the stoppage or reduction of cost-of-living adjustments to the salaries of all federal judges. Similarly, in *Jorgensen v Blagojevich*, 211 Ill 2d 286, 298-299; 811 NE2d 652 (2004), the Supreme Court of Illinois found the rule applicable in a case that was brought on behalf of all Illinois judges and challenged the governor's attempt to block the implementation of a cost-of-living salary adjustment.[2]

The rule of necessity has been recognized in Michigan. See e.g., *Bliss v Caille Brothers Co*, 149 Mich 601, 609-610; 113 NW 317 (1907). Most recently, in *Champion's Auto Ferry Inc v Public Service Commission*, 231 Mich App 699; 588 NW2d 153 (1998), this Court considered the rule of necessity in the context of an appeal from a decision of the Public Service Commission ("PSC"). One of the issues before this Court was whether all of the members of the PSC should have been disqualified from the matter. The Court, citing *Will* and *Bliss*, found that, even assuming a valid basis for disqualification existed, the rule of necessity "comes into play":

> Aside from questions of the PSC's jurisdiction, which will be addressed later in this opinion, assuming proper jurisdiction, that jurisdiction is generally exclusive; no other agency, and no court, has been delegated by the Legislature the power delegated to the PSC to regulate water carriers. Accordingly, if the PSC's involvement in prior federal administrative and federal and state judicial proceedings requires recusal of all its individual members, or enough of them so as to prevent a quorum from assembling, the rule of necessity precludes recusing the members of the PSC if disqualification would then leave the PSC unable to adjudicate questions otherwise properly presented for its resolution. [*Champion's Auto Ferry*, *supra* at 709-710.]

In the case at bar, as mentioned, in regard to an economic and pecuniary interest in the outcome of these proceedings, we consider the judges of this Court to stand as a whole. In light of the common interest shared by all the judges, to the extent that interest is disqualifying, it would require recusal of all individual judges, or at least enough to prevent a quorum from assembling to adjudicate the questions presented for resolution in this matter. Consequently, "the rule of disqualification of judges must yield to the demands of necessity." *Bliss*, *supra* at 609.

IV. Conclusion

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[2] Although *Will* and *Jorgensen* are decisions from courts of last resort, intermediate appellate courts have also applied the Rule of Necessity. See e.g., *Williams v United States*, 240 F3d 1019, 1025-1026 (CA Fed, 2001) (finding the rule applicable "if necessary to the exercise of the court's jurisdiction."); *In re Marriage of Alarcon*, 149 Cal App 3d 544, 550 n 2; 196 Cal Rptr 887 (1983) (finding the rule applicable in a circumstance where, "[t]o disqualify one is to disqualify all.").

RMGN has moved to disqualify the seven judges of this Court who would lose their judgeships if the initiative petition at issue were approved. RMGN alleges that because of those judges' economic and pecuniary interest in the outcome of the proceedings, they cannot impartially decide this case. However, we find RMGN's attempt to distinguish the economic and pecuniary interest of those seven judges unpersuasive in light of the fact that all the judges of this Court may have an economic and pecuniary interest in the outcome of these proceedings since, if the initiative petition is approved, all judges of this Court will be subjected to a 15 percent salary reduction. In terms of economic and pecuniary interest, we find the judges of this Court to stand as a whole, and to the extent the judges' economic and pecuniary interest is disqualifying, under the rule of necessity, recusal of the entire Court of Appeals bench would be improper.

The motion for recusal is DENIED.

Whitbeck, J. (*concurring*).

I concur with the majority. I write separately to cover any aspect of MCR 2.003 and of due process considerations that may apply to me individually. RMGN asserts that an impartial judiciary is of obvious importance to the litigants and attorneys whose cases are adjudicated, and I agree. RMGN asserts that due process requires an impartial decision-maker, and again I agree. But these concepts cut both ways. Indeed, the United States Court of Appeals for the First Circuit put it most succinctly when it said:

> [T]he disqualification decision must reflect *not only* the need to secure public confidence through proceedings that appear impartial, *but also* the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking.[3]

I. Basic Facts And Procedural History

On August 1, 2008, along with its motion to intervene and supporting papers, RMGN filed a motion for recusal. In addition to the background set out in the majority opinion, I note that RMGN's August 1 motion cited MCR 2.003 and asserted that the seven affected Court of Appeals judges, including me, have an economic interest in the subject matter of the controversy and that this interest is more than a de minimis interest that could be substantially affected by the proceeding. RMGN also asserted that the seven affected Court of Appeals judges, including me, have a direct, personal, substantial pecuniary interest in reaching a conclusion and that participation by these judges would violate the Due Process Clause of the Michigan Constitution,[4] and the Fourteenth Amendment to the United States Constitution.[5] I also note that on August 11, 2008, a duly constituted motion panel for the Fourth District of the Court of Appeals, consisting of Presiding Judge Bill Schuette, Judge Patrick Meter, and myself, heard oral argument on that motion. At that oral argument, counsel for RMGN

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[3] *In re Allied-Signal, Inc*, 891 F2d 967, 970 (CA 1, 1989) (emphasis original).
[4] Const 1963, art I, § 17.
[5] US Const, Am XIV.

asserted that its motion for recusal was directed only at me. However, as the majority opinion notes, the motion itself is directed at *seven* judges of the Court of Appeals; RMGN had an opportunity to amend its motion, but failed to do so.

II. MCR 2.003

MCR 2.003, concerning the disqualification of a judge, provides as follows:

> (A) Who May Raise. A party may raise the issue of a judge's disqualification by motion, *or the judge may raise it.*[6]

III. Canon 3

Canon 3 of the Michigan Code of Judicial Conduct provides, in pertinent part, as follows:

> C. Disqualification. A judge *should* raise the issue of disqualification whenever the judge has cause to believe that grounds for disqualification may exist under MCR 2.003(B).[7]

IV. Disclosure

Based both on MCR 2.003(A) and Canon 3C, I made certain disclosures, discussed more fully below, at our August 11 hearing. At the conclusion of that hearing, I asked counsel for RMGN whether he was satisfied that I had complied with my ethical responsibilities in terms of the disclosures that I had made. He stated that he was.

V. Economic Interest

A. MCR 2.003

As RMGN asserts, and as I disclosed at the oral argument on RMGN's recusal motion, the term of my judgeship will expire on January 1, 2011. I am therefore one of the seven judges on the Court of Appeals that the RMGN proposal would turn out of office on December 20, 2008. As I am part of the defined contribution plan under the judges' retirement system, my "pension" consists of a 401(k) plan and a 457 plan and adoption of the RMGN proposal would have no effect on that "pension" as it would exist on December 20, 2008. Thereafter, however, matching contributions by the state to my 401(k) plan would cease. I am vested in the state health plan and therefore adoption of the RMGN proposal would have no effect on my healthcare benefits. But, of course, adoption of the RMGN proposal would result in the loss of my annual salary of $151,441.00.

There are, however, a number of other factors that come into play when considering my economic interest in the outcome of this case. As I disclosed during the course of oral argument on the recusal motion, I am 67 years old and, therefore, in the autumn of my judicial career. My financial situation is such that it makes relatively little economic difference to me whether I leave the Court of Appeals on December 20, 2008, on January 1, 2011, or on some other date. Indeed, I could earn considerably more as a private practitioner, or in other endeavors, commencing December 21, 2008, than I could by remaining as a Court of Appeals judge. In this regard, when I came to the Court of Appeals almost 12 years ago, I took an overall pay cut. And that pay cut has become more substantial

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[6] (Emphasis added).
[7] (Emphasis added).

over the years as my judicial salary has remained relatively constant while inflation and the amount of money that I could earn as a private practitioner have both increased.

Generally speaking, a trial judge is presumed to be impartial, and the party who asserts partiality has a heavy burden of overcoming the presumption.[8] As a matter of logic, the same presumption applies to an appellate judge. Further, the Michigan Supreme Court has recognized that every judge is granted "every presumption of fairness, and integrity, and heavy indeed is the burden assumed in this Court by the litigant who would impeach the presumption so amply justified through the years."[9]

RMGN relies in part on *In re Disqualification of 50th District Court Judge*.[10] In that case, a district court judge was acting as the examining magistrate in a preliminary examination.[11] After the judge denied a motion to disqualify, the prosecutor filed a complaint for an order of superintending control in the circuit court.[12] On the same day, the district court chief judge held a hearing regarding the prosecutor's motion to review the motion to disqualify the district court judge who was acting as the examining magistrate.[13] At that hearing, the chief judge found no basis for disqualification.[14] Several weeks later, the circuit court denied the prosecutor's order for superintending control.[15]

In the interim, however, the prosecutor filed a new motion to disqualify the district court judge "on the basis of [his] alleged financial ties to a law firm representing some of the defendants."[16] The district court judge denied the motion "but in so doing admitted his joint ownership interest of the property on which was located the office of defense counsel['s] . . . law firm and of the lot on which the firm's annex was located."[17] After several appeals, the circuit court entered an opinion stating that "an appearance of impropriety occurs 'when a sitting judge on a case has financial ties to an attorney for one of the parties.'"[18] However, the circuit court found that there was no showing of actual bias or prejudice on the part of the district judge because his financial ties to the law firm were not grounds for disqualification under MCR 2.003.[19] This Court reversed, holding that "the appearance of impropriety arising from the financial ties between [the district judge] and [the defense counsel's] law firm required [the district judge] to disqualify himself even without a showing of actual bias or prejudice."[20]

RMGN appears to assert that this case stands for the proposition that an economic interest in the outcome of a case requires an *automatic* disqualification. RMGN asserts that "if a judge's financial interest in the law offices of an attorney of the parties before him requires automatic

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[8] *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). See also *Van Buren Charter Twp v Garter Belt, Inc*, 258 Mich App 594, 598; 673 NW2d 111 (2003), and *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999).
[9] *Mahlen Land Corp v Kurtz*, 355 Mich 340, 351; 94 NW2d 888 (1959). See also *Aetna Life Ins Co v Lavoie*, 475 US 813, 820; 106 S Ct 1580; 89 L Ed 2d 823 (1986) (citation and internal quotation omitted) (where the United States Supreme Court also noted this presumption and recognized that "the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.").
[10] *In re Disqualification of 50th Dist Court Judge*, 193 Mich App 209; 483 NW2d 676 (1992).
[11] *Id.* at 211.
[12] *Id.* at 211-212.
[13] *Id.* at 212.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 213.
[19] *Id.*
[20] *Id.* at 214.

disqualification, the judges whose very position is [sic] at stake should not decide the fate of a constitutional amendment that would result in the elimination of their jobs."

I do not agree. First, this Court's reference *In re Disqualification of 50th District Court Judge* to an *automatic* disqualification[21] was in the context of a direct interest by a judge *in the property of the lawyers for one of the litigants*. This Court made no reference to the standard in MCR 2.003(B)(5) concerning a judge's economic interest *in the subject matter in controversy*. Thus, the automatic disqualification language does not apply here, as I have no interest in the property of the lawyers here or in the property of the litigants they represent.

Secondly, and most importantly, this Court reached its decision in *In re Disqualification of 50th District Court Judge* "after evaluating the totality of the circumstances."[22] Exactly the same approach must be utilized here. The ultimate question that I, and every judge faced with a disqualification motion under MCR 2.003, must consider is whether I can impartially hear the case before me. I believe that I can, for the following reasons:

- Under the totality of the circumstances, my economic interest in the outcome of this case is minimal.

- While I would lose my Court of Appeals salary if the RMGN proposal were to be adopted, given my financial situation, this would have almost no economic impact on me.

- Indeed, I could, I believe, earn substantially more than my current salary were I to re-enter private practice or pursue other endeavors. On balance, the actual economic impact on me would be minimal.

Consequently, I believe that any connection between the potential loss of my judicial salary and my actual economic interest in the outcome of this case is attenuated at best.[23] While there may be "power and prestige," as RMGN puts it, associated with being a Court of Appeals judge, these factors have no economic value. Accordingly, and after considering the totality of the circumstances, I decline to recuse myself from this case under the economic interest standard set out in MCR 2.003(B)(5).

B. Due Process

RMGN also asserts a due process ground for recusal. As the majority notes "[t]he Due Process Clause demarks only the outer boundaries of judicial disqualifications."[24] As the majority further notes, where a state has adopted its own standards for judicial disqualification, those standards will control, as any violation of the Due Process Clause will also be likely to amount to a violation of the state standard.[25] Consequently, the primary authority for determining whether disqualification is warranted is the court rules.

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[21] See *id.* ("We believe that where, as here, the judge's economic relationship with a law firm is more than de minimis, automatic disqualification is required.").
[22] *Id.*
[23] See *Olson v Olson*, 256 Mich App 619, 643; 671 NW2d 64 (2003) (stating that the "[d]efendant's proposition that Judge Halloran's career as a judge was at stake, thus implicating his future judicial salary, is too tenuous to be considered a valid ground for disqualification under MCR 2.003(B)(5).").
[24] *Aetna Life Ins Co*, *supra* at 828.
[25] See Flamm, Judicial Disqualification (2nd ed) § 2.5.2, p 34-35.

With this in mind, under a due process challenge to a judge's participation in a case, the grounds for recusal are phrased in somewhat different language than in MCR 2.003. The due process standard is whether the judge "has a direct, personal, substantial, pecuniary interest in reaching a conclusion against" a litigant.[26] RMGN cites two Michigan cases for the proposition that where a judge "has a pecuniary interest in the outcome," "recusal is constitutionally *required*."[27] This proposition is a misstatement of the law.

The first Michigan case to which RMGN cites is *Crampton v Department of State*.[28] There, the Lansing police arrested Crampton for driving while intoxicated.[29] Crampton refused to submit to a blood alcohol test, the penalty for which is the suspension or revocation of the defendant's driver's license.[30] The Secretary served notice of the suspension on Crampton, who then exercised his right to a hearing before the License Appeal Board.[31] The panel that presided over Crampton's hearing included a member of the Lansing police force.[32] The Supreme Court held that Crampton was denied due process of law, stating that "[a]ppeal board panels which are membered by full-time law enforcement officials are not fair and impartial tribunals to adjudge a law enforcement dispute between a citizen and a police officer."[33]

The *Crampton* Court noted that "[t]he United States Supreme Court has disqualified judges and decisionmakers without a showing of actual bias in situations where 'experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'"[34] Relying on several United States Supreme Court cases,[35] the Court in *Crampton* stated that "[a]mong the situations identified by the [United States Supreme] Court as presenting that risk[36] are where the judge or decisionmaker . . . has a pecuniary interest in the outcome[.]"[37]

Several points are significant here. First, *Crampton* is *not* a case involving any sort of pecuniary interest. Second, neither the Unites States Supreme Court in *Withrow* nor the Michigan Supreme Court in *Crampton* held that the existence of a "pecuniary interest in the outcome" *automatically* requires the disqualification of a judge with such an interest. Rather, both Courts identified that as a situation as presenting a risk of actual bias. Thus, the test is whether there is a showing of actual bias sufficient to raise the risk of partiality to a level so high as to be constitutionally intolerable.

The second Michigan case upon which RMGN relies is *Cain v Department of Corrections*.[38] Like *Crampton*, *Cain* did *not* involve any question with respect to a pecuniary interest in the outcome of the case by a judge for whom disqualification was sought. Rather, the Department of Corrections sought disqualification of the trial judge under MCR 2.003 on the grounds of the trial

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[26] *Aetna Life Ins Co*, *supra* at 822.
[27] (Emphasis added).
[28] *Crampton v Dept of State*, 395 Mich 347; 235 NW2d 352 (1975).
[29] *Id.* at 349.
[30] *Id.*
[31] *Id.* at 349-350.
[32] *Id.* at 350.
[33] *Id.*
[34] *Id.* at 351, quoting *Withrow v Larkin*, 421 US 35, 47; 95 S Ct 1456; 43 L Ed 2d 712, 723 (1975).
[35] *Gibson v Berryhill*, 411 US 564; 93 S Ct 1689; 36 L Ed 2d 488 (1973); *Ward v Monroeville*, 409 US 57; 93 S Ct 80; 34 L Ed 2d 267 (1972); *Tumey v Ohio*, 273 US 510; 47 S Ct 437; 71 L Ed 749 (1927).
[36] That is, situations where experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.
[37] *Crampton*, *supra* at 351.
[38] *Cain*, *supra*.

judge's "excessive personal involvement and inappropriate advocacy . . . ."[39] The Supreme Court, after an extensive discussion of the history of the case, analyzed the situation in light of the Due Process Clause and the *Crampton* decision. It noted that "*Crampton* sets forth specific examples of United States Supreme Court decisions that fall into the four listed categories."[40] It stated that two of these categories were implicated in *Cain*: when the judge or decisionmaker has been the target of personal abuse or criticism from the party before him[41] and when the judge or decisionmaker is enmeshed in other matters involving the petitioner.[42] Quite obviously, then, *Cain* is also not a case in which the judge in question had a pecuniary interest in the outcome.

Cain also articulated an actual bias standard, stating that "[a]nalysis of disqualification issues under *Crampton* requires a case-by-case determination of when the risk of actual bias is too prevalent, so that the constitutional guarantee of a fair trial would be inhibited."[43] And the Court also said that it had examined the issue of judicial disqualification pursuant to the Due Process Clause and "ha[d] found that disqualification for bias or prejudice is only constitutionally required in the most extreme cases."[44] Clearly, *Cain* does not stand for the proposition that a showing, alone, of possible bias under any of the four listed categories *automatically* requires judicial disqualification.

Thus, in my view and contrary to RMGN's assertion, a judge is not required to enter an *automatic* disqualification when there is a prima facie showing of a pecuniary interest in the outcome of a case. Rather, that judge must have an actual bias as a result of that pecuniary interest that presents an intolerably high risk of partiality so as to require disqualification on due process grounds.

RMGN is absolutely correct that an impartial judiciary is of obvious importance to the litigants and attorneys whose cases are adjudicated. It is also absolutely correct that due process requires an impartial decision-maker. The question, then, is whether my real, rather than prima facie, pecuniary interest in the outcome of this case causes me to have an actual bias so that there is such a high risk of partiality on my part as to require my disqualification on due process grounds.

I have concluded that my actual pecuniary interest here, such as it is, does not result in an actual bias that results in a high risk of partiality on my part. As I have noted above, the elimination of my judgeship on December 20, 2008, would affect neither my pension nor my health benefits. I would, of course, lose my judicial salary on that date. Given my financial situation, however, this would have minimal actual economic impact on me. In fact, I could, I believe, earn substantially more than my current salary were I to re-enter private practice or pursue other endeavors. Accordingly, and after considering the totality of the circumstances, I decline to recuse myself from this case on due process grounds.

VI. Other Grounds

As I mentioned at the August 11 oral argument, I believe that the MCR 2.003 and Canon 3C strongly suggest, if they do not require, a judge to raise issues that might impact on that judge's impartiality in a particular matter. At oral argument, I noted two general areas of concern. The first was my relationship with certain of the attorneys and other persons involved in this case. The second was

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[39] *Id.* at 493.
[40] *Id.* at 500.
[41] *Id.*
[42] *Id.* at 501.
[43] *Id.* at 514 (emphasis added).
[44] *Id.* at 498.

the public position that I took as Chief Judge of the Court of Appeals in 2007 in opposition to a proposed reduction in the number of judges on our Court.

With respect to the first area, as I outlined at oral argument, Ms. Barton, one of the attorneys for the Secretary and the Board, was one of the attorneys representing me when I was the State Employer. I also worked with her on several matters when I was in private practice. I have known Mr. Ellsworth, one of the attorneys for plaintiffs, when he was counsel to Governor Milliken, and I was a special assistant attorney general representing the State Employer and thereafter worked with him on several other matters when I was in private practice and in government service. Mr. Pirich, one of the attorneys for plaintiffs, and I were partners at the Honigman firm years ago, and I worked with him on a number of matters. Mr. Pirich contributed to, and was active in, both of my campaigns for re-election to the Court. I also worked with Ms. Hansen, another of the attorneys for plaintiffs, on a number of matters when I was at the Honigman firm. I know Mr. LaBrant of the Michigan Chamber of Commerce, and the Chamber both endorsed me in my last campaign for re-election and contributed to that campaign. I know Ms. Bryrum of Bryrum & Fisk, and she also endorsed me in my last campaign. And I know Mr. Gafney of the Michigan AFL-CIO, and a number of the member unions of the AFL-CIO also endorsed me and contributed to my last campaign.

I do not believe that these associations, either individually or in the aggregate, require me to recuse myself from this case. To a certain extent, my association with these individuals is a function of the over 40 years that I have been involved in both the practice of law and in government service in Lansing. Lawyers that I have known and liked and who have contributed to my various campaigns have appeared before me at numerous times in the nearly 12 years that I have been on the Court of Appeals. I believe that the record reflects that I have treated them, and their clients, fairly but without any bias in their favor. The automatic disqualification with respect to the Honigman firm[45] expired years ago. I have heard cases involving that firm on a routine basis, according to the random draw system that we utilize in our Court, since that expiration. I believe that I have participated in the decisions in those cases on an impartial basis. Accordingly, I decline to recuse myself on this ground.

The issue with respect to my comments as Chief Judge in 2007 in opposition to a proposed reduction of four judges on our Court is a different one. I stated then, in essence, that I did not believe, as a policy matter, that the workload statistics *per judge* on our Court warranted such a reduction. These statements are a matter of public record.

However, the position that I then articulated on behalf of our Court bears no relationship whatever to the *legal* issues that this case involves. First, these issues are procedural rather than substantive. This Court is not called upon to decide whether a reduction in the number of judges at our Court is a good idea or a bad one. Rather, we are called upon to decide whether the issuance of a writ of mandamus under the circumstances of this case is warranted. This is, and must be, a wholly different question from whether it is wise or justified to reduce the number of judges on this Court.

Second, my policy preferences are utterly irrelevant to my judicial responsibilities when sitting on this, or any other, case. Judges often face the dichotomy between their policy preferences and the policy that the Constitution, statutes, or binding precedent of the higher courts may articulate. Good judges set aside their own policy preferences. They decide the case according to the policies that the Constitution, the statutes, and such binding precedent contain. If a judge is unable to do this, then that

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[45] See MCR 2.003(B)(4).

judge should not be on the bench. I believe my record on the Court of Appeals[46] indicates that I have been able to deal objectively with situations where my own policy preferences may vary from those that the law sets out. I intend to adopt the same approach in this case. I therefore decline to recuse myself on this ground.

VII. The Appearance Standard

RMGN refers to the standard in Canon 2A that calls upon judges to "avoid all impropriety and the appearance of impropriety" to foster "[p]ublic confidence in the judiciary." The Michigan Supreme Court has dealt directly with this issue in *Adair v State of Michigan*.[47] There, the Court said that the appearance of impropriety standard must be read in context with the statement in Canon 3C. That Canon states with regard to a specific question of judicial disqualification that the judge "should raise the issue of disqualification whenever the judge has cause to believe that grounds for disqualification may exist *under MCR 2.003(B)*."[48] The Court went on to say that:

> The "appearance of impropriety" standard is relevant not where there are specific court rules or canons that pertain to a subject, such as judicial disqualification, but where there are *no* specific court rules or canons that pertain to a subject and that delineate what is permitted and prohibited judicial conduct. Otherwise, such specific rules and canons would be of little consequence if they could always be countermanded by the vagaries of an "appearance of impropriety" standard. Here, there are specific rules and canons that pertain to judicial disqualifications, and these must be understood as defining what does and what does not constitute an impropriety in this realm.[49]

Thus, the "appearance of impropriety" standard has no applicability with respect to judicial disqualifications, and for good reason. As the Supreme Court went on to say:

> This standard cannot be equated with *any* person's perception of impropriety, lest a judge find himself or herself subject to a barrage of recusal motions on the part of *any* person who apprehends an impropriety, however unreasonable this apprehension. Rather, this standard must be assessed in light of what can be gleaned from existing court rules and canons, historical practices and expectations, and common sense.[50]

Here, simply because RMGN apprehends an impropriety does not make it so. Accordingly, I decline to recuse myself on this ground.

VIII. Conclusion

I conclude that, after considering the totality of the circumstances, the economic interest standard set out in MCR 2.003(B)(5) does not require me to recuse myself in this case. I further conclude that my actual pecuniary interest in this case, such as it is, does not result in an actual bias that results in a high risk of partiality on my part and therefore that due process does not require me to recuse

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[46] See, for example, *Associated Builders & Contractors v Dep't of Consumer & Industry Services*, 267 Mich App 386; 705 NW2d 509 (2005) (Whitbeck, J. concurring).
[47] *Adair v State of Michigan*, 474 Mich 1027; 709 NW2d 567 (2006).
[48] *Id.* at 1038-1039 (emphasis in original).
[49] *Id.* at 1039 (emphasis in original).
[50] *Id.* (emphasis in original).

myself. I also conclude that neither my acquaintance with some of the lawyers and with some of the litigants in this case nor the policy positions that I articulated on behalf of the Court as Chief Judge in 2007 require me to recuse myself. I finally conclude that the "appearance of impropriety" standard is not applicable here and that, in any event, the public confidence in the impartiality of the judiciary does not require my recusal.

Here, I have looked into my conscience and have concluded that I am able to accord fair, impartial, and equal treatment to all the litigants in this case. In 1997, in 1999, and again in 2005, I swore an oath to uphold the constitutions of the United States and of Michigan. I intend to do so here and in every case in which I participate. I therefore decline to recuse myself.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

AUG 13 2008

Date

Sandra Schultz Mengel

Chief Clerk